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In the Supreme Court of the United States

OCTOBER TERM, 1972

ANTHONY J. SPILOTRO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

ANTHONY J. SPILOTRO,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Anthony J. Spilotro, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming a judgment of the United States District Court, Northern District of Illinois, dismissing a complaint for refund of excise (wagering) tax for failure to timely answer certain interrogatories and entering judgment for respondent on its counter-claim for additional tax.

OPINION BELOW

The Order of the Court of Appeals, not reported, is printed in the appendix to this petition (Appendix "A"). The order denying rehearing entered July 17, 1973 is printed as Appendix "B".

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1973. (Appendix "A"). A timely Petition For Rehearing was denied on July 17, 1973. (Appendix "B"). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

1. Has petitioner, Anthony J. Spilotro, been denied due process of law as a result of the dismissal of his complaint for refund of money illegally seized which the government applied towards an alleged excise (wagering) tax assessment and of a default judgment entered on respondent's counter-claim for the balance of such assessment?

(a) Is such action arbitrary and unjustified in view of the fact that the Court of Appeals for the Seventh Circuit, in another decision, as well as the United States Tax Court, have held that illegally seized evidence cannot be used by the government as the basis for a tax determination?

(b) Additionally, did not the objections tendered by the petitioner to respondent's interrogatories meet the requirements of Rule 33, Federal Rules of Civil Procedure?

STATEMENT OF THE CASE.

On February 3, 1970, the Chicago Police Department conducted a gambling raid of a second floor apartment located at 8712 West Berwyn Avenue. Anthony Spilotro was in the hallway between the apartment door and the outer door when he was arrested. The police officers did not have a warrant for his arrest nor a warrant to search him. The police seized $11,613.00 from Spilotro's person and gambling records from the apartment, and turned them over to the Internal Revenue Service.

On February 10, 1970, the District Director of the Internal Revenue Service caused a jeopardy assessment for unpaid wagering taxes to be made against him covering the period January 1 to February 10, 1970.

Spilotro was indicted by the State with one Mike Segreti, charging Spilotro with keeping a gambling place. A hearing on a motion to suppress was held in the Circuit Court of Cook County, Illinois. The judge suppressed the gambling paraphernalia and held that "there is no information stated that Anthony Spilotro is in any way a courier or pick up man, or what have you in this gambling operation." The judge ordered the return of $11,613.00 to Spilotro; however, the order was qualified so as not to have effect on the levy made by the Director of Internal Revenue. (The suppression by the State Court was conceded by the government and recognized by the Court of Appeals in its Order.)

Spilotro then pursued his administrative remedy and petitioned the Director of Internal Revenue for abatement of the jeopardy assessment. Said petition was denied. (R. 30)

On May 26, 1971, Spilotro filed a complaint for refund in the District Court alleging, in essence, that the gam-

bling records seized in the apartment did not belong to him and that he was neither the owner nor lessee of that apartment; that he violated no laws of the United States upon which forfeiture of the $11,613.00 could be predicated; that the assessment against him for $19,590.00 was based on the wagering records seized by the Chicago Police Department in the apartment; that the District Director's own report indicated that the only evidence used by him in assessing the amount Spilotro owed was the wagering records seized in the apartment; that said records were found to have been unlawfully seized in violation of his Constitutional Rights; and that the assessment made against him was invalid. (R. 3)

Then the following occurred:

August 6, 1971—the government filed a motion to extend time to answer or otherwise plead to and including September 21, 1971. Said motion was granted (R. 11).

September 22, 1971—the government answered Plaintiff's complaint and filed a counterclaim alleging in essence that $11,613.00 seized from Spilotro has been paid, and there remained due and owing the government a balance of $8,378.45 (R. 12, p. 4).

October 4, 1971—the government proposed 15 interrogatories to Spilotro. (R. 14, App. C, pp. 8-11)

November 8, 1971—Plaintiff was given two weeks to answer or object to said interrogatories (R. 16).

November 26, 1971—the cause was set for a Report on December 13, 1971. (R. 17)

December 15, 1971—the cause was continued to December 16, for pre-trial conference. Plaintiff was given an additional twenty days to file objections to interrogatories. (R. 19)

January 14, 1972—Plaintiff filed a Notice of Deposition to D. C. Leonardi, an Internal Revenue Agent, requesting him to bring all wagering records and all materials with respect to the jeopardy assessment in question. (R. 20)

February 11, 1972—the government filed a Memorandum in Support of its Motion to Dismiss the complaint. (R. 24) Defendant's Motion to Dismiss was continued until February 24, 1972. (R. 25)

February 25, 1972—Plaintiff filed objections to the interrogatories. Plaintiff's counsel attended the deposition of Agent Leonardi, who had prepared the assessment against Spilotro. At that deposition Leonardi stated that he and another agent decided to make the assessment against Spilotro because of his reputation, although the government had no evidence that Spilotro had any interest, proprietary or otherwise, in either the records or the premises from which they were seized. Spilotro then contended that the interrogatories were irrelevant and immaterial as well as constitutionally impermissible. In Spilotro's objections to the interrogatories, plaintiff inquired of the government as to how any of the interrogatories were relevant. (R. 27)

February 25, 1972—the cause was continued until February 28, 1972, for ruling on plaintiff's objections to the interrogatories and the defendant's Motion to Dismiss (R. 28).

February 28, 1972—the cause was continued to March 6, 1972, for a ruling on the above.

March 2, 1972—plaintiff filed a motion for summary judgment (R. 30) contending that (1) the State court had held there was no probable cause to arrest plaintiff,

and (2) Leonardi had testified at a deposition that the assessment was based on the gambling records seized by the police in the apartment, and the assessment was made because of plaintiff's reputation and Leonardi's belief that the other parties in the apartment were under Spilotro's control.

March 6, 1972—the government was given leave to file a memorandum in opposition to plaintiff's objections to the interrogatories and the cause was set for March 27, 1972, for a ruling on plaintiff's motion for summary judgment. On March 7, 1972, on the Court's own motion the cause was set for March 8, 1972, for reconsideration of its order on March 6, 1972 (R. 31).

March 8, 1972—the Court entered an order vacating its order of March 6, 1972; it gave the government two weeks to file a memorandum in opposition to plaintiff's objections. The motion to dismiss filed by the government and the plaintiff's motion for summary judgment were held in abeyance (R. 32).

March 24, 1972—the government filed its memorandum in support of its alternative motion for an order to compel answers to the interrogatories (R. 35). The government framed the issue as follows:

> "In a tax refund suit, where the plaintiff alleges that the assessment is arbitrary, may the plaintiff properly refuse to cooperate with the discovery procedures provided for by the Federal Rules of Civil procedure?"

April 19, 1972—the government filed a supplementary memorandum concerning the question of whether a party may maintain a civil action while refusing to answer questions which are relevant to his claim (R. 39).

April 28, 1972—the Court filed its memorandum opinion ordering the plaintiff to answer the 15 interrogatories within twenty days, stating that it would be inappropriate to entertain plaintiff's objections to said interrogatories (R. 41).

May 8, 1972—plaintiff filed a motion to vacate the court's order of April 28, 1972, contending that the Court impliedly granted plaintiff leave to file objections to said interrogatories (R. 42).

May 23, 1972—an order was entered governing the procedure prior to trial (R. 43).

May 26, 1972—the government filed a memorandum of law in opposition to plaintiff's motion to vacate the Court's order of April 28, 1972.

May 30, 1972—the motion of the government to dismiss, filed on February 11, 1972, was allowed.

June 5, 1972—the government filed affidavit for the entry of default as to its counterclaim. The order of default was entered (R. 46-47).

June 12, 1972—the government's motion for default judgment in the amount of $8,378.45 was allowed (R. 53).

REASONS FOR GRANTING THE WRIT

ANTHONY J. SPILOTRO HAS BEEN DEPRIVED OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW

The District Court order dismissing petitioner's complaint for refund of excise (wagering) tax and granting respondent's counterclaim for the balance of assessment for such tax deprives petitioner of his property without due process of law guaranteed to him by the Fifth Amendment to the Constitution of the United States.

The record is clear that the assessment against petitioner for federal excise taxes in the amount of $19,759.00 was based exclusively on records seized in an apartment, in which records and apartment petitioner had no interest whatsoever, and on the examining revenue agent's decision to make such assessment because of petitioner's alleged reputation. Based on the adjudicated illegality of the search of petitioner's person and recognition that the records seized in the apartment did not belong to him, a refund suit was instituted for $11,613.00 seized from him, the respondent counter-claiming for the balance of the assessment. Thereafter, on October 4, 1971, the respondent served fifteen interrogatories upon petitioner for answer. Objections to said interrogatories were filed by petitioner on February 25, 1972 based, in general, upon immateriality, irrelevancy and "constitutional impermissibility" which was recognized to be "the Fifth Amendment." On March 2, 1972, motion for summary judgment was filed on petitioner's behalf, contending that the assessment was based on an illegal search and seizure of petitioner's person, on attributing records seized in apartment to petitioner in which he had no interest, and an arbitrary, unfounded as-

sumption or belief by the examining revenue agent that petitioner was a gambler and in control of the apartment searched by the Chicago Police Department.

The District Court, although first ordering the government on March 6, 1972 to respond to petitioner's objections and setting March 27, 1972 for ruling on his motion for summary judgment, entered an order on March 8, 1972 vacating its March 6, 1972 order and gave the government two weeks to file a memorandum in opposition to petitioner's objections to interrogatories. Ruling on the government's motion to dismiss the complaint filed on February 11, 1972 and petitioner's motion for summary judgment were held in abeyance.

On April 28, 1972 the District Court ordered petitioner to answer interrogatories, holding it would be inappropriate to entertain petitioner's objections to interrogatories. Petitioner objected thereto, but in spite of his objections the District Court on May 30, 1972 dismissed the complaint and on June 18, 1972 entered default judgment against him upon the government's counterclaim.

A party is not under an absolute duty to respond to interrogatories. Rule 26 (b) (1) sets the standard for all discovery, including written interrogatories. It provides for discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending litigation. The scope of pre-trial discovery is circumscribed by the Fifth Amendment privilege against self incrimination as well as the requirement of relevancy. *deAntonio* v. *Solomon,* 41 F.R.D. 447 (D. Mass. 1966); *Standard Insurance Co.* v. *Pittsburg Elec. Insulation, Inc.,* 29 F.R.D. 185 (W.D. Pa. 1961). Implicit in the concept of relevancy is the element of reasonable proximity, in circumstance of time and place of the matter inquired about.

Sutton v. *Warner Brothers,* 12 F.R.D. 192 (E.D. Pa. 1951). Under this test, interrogatories 1, 3, 4, 6, 7 and 9 are clearly irrelevant. Interrogatories which call for information that is not relevant to issues raised by the material allegations contained in the pleadings need not be answered. *Sears, Roebuck & Co.* v. *Harrison,* 1 F.R.D. 135 (D. Ill. 1940); *O'Rourke* v. *R.K.O. Radio Pictures,* 27 F. Supp. 996 (D. Mass. 1939). The government admitted, in paragraph 10 of its answer, that the $19,759.00 assessed against the petitioner was based on the gross amount of wagers ($197,590.00) as determined by analysis of the records seized in the Segretti apartment (R. 13, 12). Therefore the remaining interrogatories are also irrelevant.

Further, the presumption that this tax assessment is valid has been refuted by plaintiff. *Compton* v. *United States,* 334 F.2d 212 (4 Cir. 1964); *New York Life Insurance Co.* v. *Gumer,* 303 U.S. 161 (1938); *Kentucky Trust Co.* v. *Glenn,* 217 F.2d 462 (6 Cir. 1954). The preliminary statement sent to Spilotro stated that the tax computed was determined by an analysis of wagering records seized by the Chicago Police Department on January 31, 1970, at 8712 West Berwyn. (R. 3, Exhibit D). On January 27, 1972, plaintiff's counsel took the deposition of Dennis C. Leonardi who is employed by the Internal Revenue Service and who prepared the preliminary statement sent to Spilotro. Leonardi stated he made the assessment because ". . . he [Spilotro] was entering the premises and he has a record of gambling . . . I believe the other parties were probably under his direction." Asked what he based that conclusion on, Leonardi stated "the fact of his reputation." (Leonardi Dep. p. 32). Leonardi testified that since Spilotro had a history of gambling, was arrested a number of times in the past for gambling, and had indicated income from gambling on one of his Federal In-

come Tax Returns, "we assumed that he had some sort of propriety interest in the apartment." (Leonardi Dep. pp. 31-32). Leonardi further testified that Spilotro did not have a lease or sublease on the apartment (Leonardi Dep. p. 31).

On February 28, 1972, the Court noted that as an objection to answering the interrogatories, petitioner's counsel raised the question that the assessment was calculated from records which were illegally seized. (Tr. 2). The Court inquired whether it was plaintiff's position that the Court should rule on the question of the illegality of the seizure before requiring plaintiff to answer the interrogatories; plaintiff's counsel stated that that was correct.

The petitioner made a clear showing that the assessment was based on illegally seized evidence and on an arbitrary, unfounded assumption or conclusion that he had some interest in the apartment and records seized therefrom, which showing destroyed the *prima facie* correctness of the government's jeopardy assessment. *Romanelli* v. *Commissioner,* 466 F.2d 872 (7 Cir. 1972), and *Suarez* v. *Commissioner,* 58 T.C. No. 78, both holding that illegally seized evidence cannot be used in a civil tax case. *Suarez* goes even further, holding that the *prima facie* correctness of the Commissioner's determination is destroyed if based upon such evidence, and requiring the government to go forward with independent, untainted proof to support its assessment or determination. In effect, the Tax Court shifts the burden of first proceeding to the government, and failing in such effort, it follows that the assessment must fall. See also *Pizzarello* v. *United States,* 408 F.2d 579 (2 Cir. 1969); *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392 (1920).

As it became clear that the government's claim of tax liability was without foundation, and based on illegally seized evidence which could not be "connected up" with Spilotro, his counsel filed a motion for summary judgment. He argued to the Court that it had power to enjoin the attempted tax collection and order the government to return the seized money to Spilotro, since there were no circumstances under which the government could ultimately prevail. At the time of suit, the government had no evidence other than the gambling records illegally seized from the Segretti apartment which were in no way connected up with Spilotro.

On March 6, 1972, the trial Court, succinctly analyzing petitioner's position with reference to why he should not have to answer the written interrogatories, stated to the Assistant United States Attorney:

> The Court: "He says that there you are seeking to substitute legally obtained evidence for illegally obtained evidence.
>
> Mr. Siegan (A.U.S.A.): That is supposed to be the purpose of a motion to compel answers to interrogatories, and we will be more than happy to supply your Honor with information, with citations, and then after your Honor rules, file our motion for summary judgment." (Tr. 28).

The question as to whether the government has a chance of ultimately prevailing is to be determined on the basis of information available to it at the time of suit. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7 (1962); *Thrower* v. *Miller*, 440 F.2d 1186 (9 Cir. 1971).

The Court of Appeals' decision, in effect, condones an illegal seizure of property and jeopardy assessment of

wagering tax by the Internal Revenue Service which were made without legal justification and without due process of law.

In affirming the lower court's decision, the Court of Appeals stated that,

> "* * * it is certainly not clear that the taxpayer could have established the illegality of the taxes or interrogatories if objections had been timely made. * * *" App. A, p. 5).

This statement by the Court ignores the facts contained in the record.

In the first instance, the taxpayer made, at least, a prima facie showing that the assessment was based on illegally seized evidence. (See pleadings of the parties, Revenue Agent Leonardi's testimony, admissions of the government in its original brief, and the recognized State Criminal Court finding that the search of the taxpayer and seizure of $11,613.00 from him was illegal, that the property should be suppressed, and that he had no connection with the gambling operation at the searched apartment.)

In the lower federal court proceeding, it was incumbent upon the trial court, at a minimum, to determine whether petitioner's objections to interrogatories based on immateriality, irrelevancy and "constitutional impermissibility," which the Court recognized to be "the Fifth Amendment," were well-founded, albeit, the objections were not in formalistic, technical compliance with Rule 33, Federal Rules of Criminal Procedure. It should be remembered that the trial court did allow the petitioner to file objections which were accepted and considered by the Court, as well as suggesting that his attorney file a motion for summary judgment, which was done. The trial

court failed to determine whether the taxpayer's objections or motion for summary judgment were well-founded; rather, it chose to take the easy way out and dismiss taxpayer's action. The effect of the dismissal was to sacrifice fairness, justice, and due process to form. This is a clear abuse of discretion and a denial of due process. All that the taxpayer requests is his day in court. The facts in this case cry out for such relief.

The Court should have made a determination whether in fact the jeopardy assessment was based on evidence independent of and untainted by the illegally seized evidence. This determination should have been made prior to requiring any answers to interrogatories by the taxpayer, since the Court of Appeals, Seventh Circuit as well as the United States Tax Court, recognize that illegally seized evidence is not admissible in a civil tax proceeding. *Romanelli* v. *Commissioner,* 466 F.2d 872 (7 Cir. 1972); *Suarez* v. *Commissioner,* 58 T.C. No. 78.

The failure of the trial court to make such a determination and the Court of Appeals affirmation of the trial court's holding, fly in the face of *Romanelli* and *Suarez, supra.* Further, the holding of both courts in effect condones the illegal activity practiced on this taxpayer by the Internal Revenue Service.

The next point deserving of consideration by the Court in determining whether this petition should be granted, is that the lower court's decision to dismiss was based solely on the fact that the answers and objections to interrogatories were, "* * * blanket objections which failed to respond to each interrogatory" and did not separate "the irrelevant from the 'Constitutionally impermissible.' " Although concededly not meeting the legalistic, formalistic, technical requirements of the Federal Rules of Civil Pro-

cedure, it cannot be argued that there were no answers given at all. The lower court, as well as the government, recognized that the constitutional point being raised was the Fifth Amendment (Tr. pp. 40 *et seq.*) Insofar as Fifth Amendment considerations were concerned, it would have been a simple task for the trial court to conduct a short hearing to determine if the pleading of the Fifth Amendment by the petitioner's attorney was well-grounded, and to which interrogatories it was being raised. In determining which interrogatories were immaterial and irrelevant, again, a short hearing would have cleared up this technical irregularity.

Further, and at the expense of repetition, the deposition of Revenue Agent Leonardi made it manifestly clear that the Commissioner's determination was based solely on illegally seized evidence. It should have followed, then, that the government be put to the burden of showing that some part of the jeopardy assessment was based on admissible evidence, independent and untainted by the illegally seized evidence. Failing in this, the conclusion should have been reached that the interrogatories were, for the purposes of this proceeding, immaterial and irrelevant because the only purpose they served was to afford the government the opportunity to "legalize" an otherwise illegal jeopardy assessment. Clearly, this is not the purpose of interrogatories or jeopardy assessments. At a minimum, the jeopardy assessment itself should have some semblance of legality and a sound factual basis, which was lacking here, especially considering that the Internal Revenue Code, for all practical purposes, empowers one man—the District Director of Internal Revenue Service—to impose such a drastic, harsh remedy, unsupervised by any disinterested, intervening magistrate.

The Order of the Court of Appeals and the District Court order ignore the fact that the order of dismissal was entered without determination of a timely motion to vacate. The Court of Appeals and the District Court ignored the argument by plaintiff that the trial Court abused its discretion in granting dismissal for failure to comply with an order to answer interrogatories, while there was pending a timely motion to vacate the order to answer interrogatories.

As was pointed out, the trial Court entered its order compelling answers to interrogatories within twenty days on April 28, 1972. On May 8, 1972, petitioner filed his motion to vacate the order of April 28, 1972. On May 26, 1972, the government filed its memorandum in opposition to petitioner's motion to vacate. On May 30, 1972, the trial court entered its order to dismiss without ruling on the motion to vacate or allowing petitioner the twenty days to answer, which its order of April 28, 1972 had granted.

Clearly, the trial Court's action was an abuse of discretion.

CONCLUSION

For the foregoing reasons, we submit the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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ARTHUR N. NASSER
Attorneys for Petitioner

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Argued May 25, 1973

June 21, 1973

Before

Hon. Tom C. Clark, Associate Justice*
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

ANTHONY J. SPILOTRO,

Plaintiff-Appellant,

No. 72-1740 vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 C 1284

James B. Parsons, Judge

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* Honorable Tom C. Clark of the United States Supreme Court, Retired, is sitting by designation.

ORDER

Plaintiff appeals from a judgment of dismissal in a suit for refund of federal excise taxes and a default judgment on defendant's counterclaim for the balance of an assessment for wagering taxes entered by the district court following plaintiff's failure to answer or to timely object to government interrogatories. We affirm.

The plaintiff, Anthony J. Spilotro, filed a complaint in the district court on May 26, 1971, seeking a refund of $11,613 in taxes allegedly illegally collected. The defendant United States answered the complaint and filed a counterclaim for the balance of a $19,759 wagering tax assessment against the taxpayer made subsequent to an arrest of the taxpayer for alleged gambling violations by the Chicago police on February 3, 1970. At the time of taxpayer's arrest, the police seized $11,613 from his person. This money was subsequently levied upon by the Internal Revenue Service following its assessment against the taxpayer. At a hearing on the alleged gambling violations in a state court, the court held that no probable cause existed for the search of the taxpayer and that the evidence obtained during the search must be suppressed.

On October 4, 1971, the United States served fifteen interrogatories on taxpayer requesting information regarding the sources of taxpayer's income, his employers and employees, wagering activities, and evidence upon which taxpayer based his claim that he was not engaged in wagering activities. Pursuant to Rule 33, Fed. R. Civ. P., taxpayer was given thirty days to file answers or objections and reasons for objections. On November 8, 1971, taxpayer was given a two-week extension within which to file the answers or objections to the interrogatories. On December 16, 1971, taxpayer was given an additional twenty

days to file answers or objections. On February 11, 1972, the United States filed a motion to dismiss for failure to answer interrogatories. Alternatively, the government asked that the taxpayer be required to answer the interrogatories. Consideration of the motion was continued until February 24, 1972 and later, on taxpayer's motion, until February 25, 1972.

On February 25, 1972, approximately 144 days after the interrogatories had been served and 51 days after answers or objections were due on the last date to which an extension had been granted, taxpayer finally filed objections. The objections stated generally that the assessment was calculated from records illegally seized on February 3, 1970, that the decision to make the assessment was made by the government because of taxpayer's reputation, and that the interrogatories propounded by the government were therefore irrelevant and immaterial as well as constitutionally impermissible. Consideration of these objections and the motion to dismiss was continued to March 6, 1972. On March 2, 1972, taxpayer filed a motion for summary judgment on the ground that the assessment was illegal because based on illegally seized evidence.

On April 28, 1972, the district court ordered taxpayer to answer the interrogatories within twenty days stating that the taxpayer waived objections by failing to timely respond and that taxpayer had otherwise failed to comply with Rule 33, Fed. R. Civ. P., by filing blanket objections which failed to respond to each interrogatory and did not separate "the irrelevant from the constitutionally impermissible." Taxpayer filed a motion to vacate on May 8, 1972, on the ground that the district court implicitly waived the tardiness in answering by permitting the filing of objections and that the objections squarely presented

the constitutional issue of self-incrimination. On May 30, 1972, taxpayer having failed to answer the interrogatories, the district court granted the government's motion to dismiss. Summary judgment for the government on its counterclaim was granted on June 12, 1972.

The district court's action was within its power of discretion. The taxpayer repeatedly ignored the requirements of Rule 33 and the extensions of time allowed by the district court. No objections were filed until 144 days after the interrogatories were served and 51 days after the close of the last extension of time permitted by the district court.[1] Rule 37(d), Fed. R. Civ. P., provides that if a party fails to serve answers or objections to interrogatories submitted under Rule 33, "the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs . . . (C) of subdivision (b)(2) of this rule." Paragraph (C) under Rule 37(b)(2) expressly allows the court to dismiss an action or to render a judgment by default against a disobedient party.

The fact that taxpayer alleges that the tax was assessed illegally and that the questions propounded by the government were constitutionally impermissible does not affect the result in this case. *Yakus* v. *United States*, 321 U.S. 444 (1944). Rule 37(d) specifically states that a failure to answer interrogatories may not be excused on the ground that the discovery is objectionable unless the party failing to act applies for a protective order under Rule

---

[1] Even when the objections were belatedly filed, they were broad, vague and non-specific.

26(c). No such order was sought in this case. Furthermore, it is certainly not clear that the taxpayer could have established the illegality of the taxes or the interrogatories if objections had been timely made. A tax assessment is presumptively valid and the burden is on the taxpayer to prove that the assessment is invalid. *Helvering* v. *Taylor*, 293 U.S. 507, 515 (1935). Although the Supreme Court has held that a person may not be criminally convicted for failure to pay the taxes here involved upon a proper claim of privilege against self-incrimination, *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), the civil liability sections have been upheld. *Collins* v. *Daly*, 437 F.2d 736, 739 (7th Cir. 1971); *Washington* v. *United States*, 402 F.2d 3 (4th Cir. 1968), *cert. denied*, 402 U.S. 978 (1971). Here the taxpayer sought to prosecute a civil proceeding rather than to defend himself in a criminal case. At least some of the interrogatories which he failed to answer were relevant to, and the answers a prerequisite for, success in the civil case.

We conclude that the district court did not abuse its discretion under the circumstances. The judgment appealed from is affirmed.

Affirmed.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 17, 1973

Before

Hon. Tom C. Clark, Associate Justice*
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

ANTHONY J. SPILOTRO, *Plaintiff-Appellant,*

No. 72-1740 vs.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern Division of Illinois, Eastern Division.

No. 71 C 1234

James B. Parsons, Judge.

*Associate Justice Tom C. Clark of the United States Supreme Court, Retired, is sitting by designation.

ORDER

On consideration of the petition of plaintiff-appellant Spilotro for a rehearing in the above entitled appeal, and the panel having voted to deny a rehearing, and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing,

It Is Ordered that the petition of the plaintiff-appellant for a rehearing or for a rehearing *en banc* in the above entitled appeal be and the same is hereby denied.

APPENDIX C

INTERROGATORIES 1 THROUGH 15 TO PLAINTIFF

1. With respect to the calendar year 1969, state with particularity:

(a) Each and every source of your gross income;

(b) The amount of gross income which you received from each and every source.

2. With respect to the period January 1, 1970, through February 3, 1970, state with particularity:

(a) Each and every source of your gross income;

(b) The amount of gross income which you received from each and every source.

3. With respect to the period February 4, 1970, through December 31, 1970, state with particularity:

(a) Each and every source of your gross income;

(b) The amount of gross income which you received from each and every source.

4. State the name and last known address of each person or firm by whom you were employed or with whom you were associated in business during 1969.

5. State the name and last known address of each person or firm by whom you were employed or with whom you were associated in business during the period January 1, through February 3, 1970.

6. State the name and last known address of each person or firm by whom you were employed or with whom you

were associated in business during the period February 4, through December 31, 1970.

7. State the names and last known addresses of all persons employed by the plaintiff, together with the dates and nature of service performed, during 1969.

8. State the names and last known addresses of all persons employed by the plaintiff, together with the dates and nature of service performed, during the period January 1, through February 3, 1970.

9. State the names and last known addresses of all persons employed by the plaintiff, together with the dates and nature of service performed, during the period February 4, through December 31, 1970.

10. If, during the period January 1, 1970, through February 3, 1970, any portion of plaintiff's gross income was derived from accepting wagers, pelase state:

(a) The total number of bets received;

(b) The total monetary amount of bets received;

(c) The amount of each bet received;

(d) The name, current or last known address, and telephone number of each person from whom a bet was received.

11. With respect to the allegation contained in paragraph 6 of the complaint, that "The cards and records seized in the Segreti apartment and car did not belong to plaintiff" set forth:

(a) The name and last known business and residence addresses of each person upon whose testimony the plaintiff relies to support this allegation;

(b) Set forth a description adequate to identify each document upon which the plaintiff relies to support this allegation.

12. With respect to the allegation contained in paragraph 9 of the complaint, that "Plaintiff was not conducting any gambling operations at the Segreti apartment and was in no way responsible for any entries made on any of the alleged records found in the Segreti apartment or car" set forth:

(a) The name and last known business and residence addresses of each person upon whose testimony the plaintiff relies to support this allegation;

(b) Set forth a description adequate to identify each document upon which the plaintiff relies to support this allegation.

13. With respect to the allegation contained in paragraph 7 of the complaint that "said monies are not the proceeds of any unlawful activity on plaintiff's part", state the source of said source of said monies and set forth:

(a) The name and last known business and residence addresses of each person upon whose testimony the plaintiff relies to support this allegation;

(b) Set forth a description adequate to identify each document upon which the plaintiff relies to support this allegation.

14. With respect to the allegation that you were not in the business of taking bets during the period January 1, through February 3, 1970, set forth:

(a) The name and last known business and residence addresses of each person upon whose testimony the plaintiff relies to support this allegation;

(b) Set forth a description adequate to identify each document upon which the plaintiff relies to support this allegation.

15. With respect to the allegation contained in the last sentence of paragraph 20(e) of the complaint, set forth a description of all evidence (documentary and otherwise) which you rely on to disprove the accuracy of the assessment.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

ANTHONY J. SPILOTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In May 1971, petitioner filed a complaint in the United States District Court for the Northern District of Illinois, seeking a refund of federal wagering taxes. He alleged that the assessment was invalid because it was based on illegally seized evidence. The government denied the illegality of the assessments and counterclaimed for the balance of the assessment (Pet. App. 2).

On October 4, 1971, the government served 15 interrogatories upon petitioner which were to be answered within 30 days. These interrogatories related to the sources of petitioner's income, his wagering activities and the evidence upon which petitioner based his claim that he was not engaged in gambling. Petitioner did not submit responses to the interrogatories at the required time. However, on November 8 and December 16, 1971, the court granted petitioner an extension of

time to January 5, 1972 within which to file his answers or objections to the interrogatories (Pet. App. 2-3).

After the expiration of the extended time period, petitioner had not answered or objected to the interrogatories. Accordingly, on February 11, 1972, the government moved either to dismiss the complaint for failure to answer the interrogatories, or to compel petitioner to answer them (Pet. App. 2-3).

On February 24, 1972, almost five months after the original service of the interrogatories and almost two months after his extended time to answer or object, petitioner filed objections, which simply stated that the questions were "constitutionally impermissible" and that the interrogatories were irrelevant because the assessment was based on illegally obtained evidence. On April 28, 1972, the district court ruled[1] that petitioner's blanket objections were inappropriate and not timely under Rule 33 of the Federal Rules of Civil Procedure[2] and ordered petitioner to answer the interrogatories within 20 days. Petitioner's motion to vacate the order was denied. After petitioner failed to answer the interrogatories the court dismissed the complaint

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[1] A copy of the district court's memorandum opinion and order is set forth in Appendix, *infra*.

[2] Because of petitioner's failure to object to the interrogatories in an appropriate and timely manner, the district court correctly refrained from ruling on the substance of his objections. It appears that certain evidence had been suppressed in a state criminal proceeding. However, petitioner introduced no evidence in the district court showing that the evidence upon which the assessment was based was the same evidence at issue in the state proceeding or that it had been illegally seized under federal standards. Cf. *Elkins* v. *United States*, 364 U.S. 206, 223-224.

and entered judgment on the counterclaim (Pet. App. 3-4). The court of appeals affirmed *per curiam* and denied a petition for rehearing and suggestion for rehearing and suggestion for rehearing *en banc* (Pet. App. 1-7).

2. As the court of appeals correctly noted (Pet. App. 4), the only question presented by this case is whether the district court abused its discretion in dismissing the complaint and entering default judgment because petitioner repeatedly ignored the requirements of the Federal Rules of Civil Procedure. Rule 37(b)(2)(C) provides that the sanction of dismissal may be applied if a party fails to comply with discovery orders. Here petitioner repeatedly ignored the time limitations of Rule 33.[3] The fact that petitioner's objections asserted that his constitutional rights had been violated does not excuse his failure to timely raise the issue. *Yakus* v. *United States,* 321 U.S. 414, 444; *Michel* v. *Louisiana,* 350 U.S. 91, 99. Under these circumstances, the district court acted within its discretion in applying the sanction of dismissal.

3. Petitioner also contends (Pet. 9, 16) that, apart from the question of the timeliness of his objections to the interrogatories, the district court improperly required him to answer them. Petitioner simply asserted in the district court that the questions were "constitutionally impermissible." But, as the court of appeals correctly noted (Pet. App. 4, n. 1), "[e]ven when the objections were belatedly filed, they were broad, vague and non-specific." Such blanket objections, without a showing with respect to each of the interrogatories

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[3] Rule 33(a), Federal Rules of Civil Procedure, provides that interrogatories shall be answered or objected to within 30 days. Rule 6(b) requires that requests for enlargements of time after time has expired be made by motion.

as to how they confronted petitioner with "substantial hazards of self-incrimination,"[4] are not sufficient to invoke any constitutional protection against providing the required answers. *California* v. *Byers*, 402 U.S. 424, 429; *Hoffman* v. *United States*, 341 U.S. 479, 486.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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[4] As the court of appeals stated (Pet. App. 5), petitioner could not be criminally convicted for failure to file wagering tax returns. *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 71 C 1284

ANTHONY J. SPILOTRO, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

MEMORANDUM OPINION AND ORDER

This motion for an order to compel the plaintiff to answer interrogatories 1 through 15 or in the alternative to dismiss the complaint arises out of a refund suit against the United States for monies allegedly seized illegally by the Chicago, Illinois, District Director of the Internal Revenue Service pursuant to an allegedly invalid tax assessment.

As a part of its discovery, the defendant requested the plaintiff to answer separately and fully fifteen interrogatories. The plaintiff was further requested to state reasons for his inability to answer in full or part any interrogatory and to state such information or knowledge as he may have concerning the unanswered interrogatory.

The defendant served the interrogatories to plaintiff on September 27, 1971, and plaintiff failed to answer or object within the thirty-day period provided for by Rule 33(a) of the Federal Rules of Civil Procedure, as amended. From that date until the filing of the defendant's February 11, 1972, motion to dismiss, the plaintiff filed no formal objections to the interrogatories. On February 25, 1972, he filed an objection to all the interrogatories based on the twofold ground that they were irrelevant and constitutionally impermissible.

It is plaintiff's position that if the tax assessment is based upon illegally seized gambling records, the tax, itself, is rendered illegal. He further maintains that in utilizing the discovery process the Government seeks to obtain legally evidence which it already possesses—such evidence having been obtained from a search adjudged illegal by an Illinois Circuit Court Judge. The Government in an articulate oral argument raised the following issues.

The substantive issues raised are (1) whether or not this taxpayer had a proprietary interest in a gambling operation and (2) assuming *arguendo* that such a proprietary interest exists, what is the correct amount of his liability?

Before reaching these substantive issues, however, it is the Government's position that the following six procedural issues must be resolved:

(1) whether a decision of a State Court to suppress evidence in a criminal proceeding is binding on a Federal Court in a civil proceeding;

(2) whether the State criterion for determining an illegal search should be applied in a Federal suppression of evidence hearing;

(3) whether this taxpayer has standing to complain of a search of someone else's apartment;

(4) whether this taxpayer can exclude evidence in a civil case that may have been discovered in a defective search;

(5) assuming *arguendo* (a) the defective search, (b) the standing to complain, and (c) the exclusion of the fruits of such defective search in a civil case, whether an administrative deter-

mination of a civil Federal tax liability is arbitrary merely because it allegedly is based in part upon evidence adjudged in a State criminal proceeding to be illegally seized; and

(6) whether this taxpayer in a civil tax refund suit may prevail merely by proving a procedural irregularity because, as the Government contends, the Commissioner in his administrative determinations may rely on inadmissible evidence, whether it be hearsay or excludable evidence.

It is to be noted that an issue similar to issue four has been decided against the taxpayers in *Romanelli* v. *Commissioner*, 54 T.C. No. 138 (July 2, 1970), which presently is pending before the Seventh Circuit.

This Court need not reach these issues to decide the matter before it.

As the Government correctly contends, a party is under a duty to respond to interrogatories submitted under Rule 33. As a leading treatise states in pertinent part (4A Moore's Federal Practice §37.05 at p. 37-90 [2d ed. 1971]):

> "* * * it is crucial, * * * that the initial request be answered and such objections as the party may have be set forth. If it were necessary to seek a court order requiring a response, followed by a response setting up objections, followed by a second motion to resolve the objections and order discovery, the possibility for delay and abuse would be apparent. Rule 37(d) makes it explicit that a party properly served had an absolute duty to respond, that is, to * * * serve answers or objections to interrogatories served upon him, * * * and that

> the court in which the action is pending may enforce this duty by imposing sanctions for its violation. * * *"

More than 150 days passed before this taxpayer filed any formal response or objection to the Government's interrogatories. And even when a response was filed, it was not in accordance with Rule 33, which provides that "each interrogatory shall be answered separately and fully in writing under oath." The taxpayer made a blanket objection to all interrogatories on the grounds that they were irrelevant and constitutionally impermissible. No attempt was made to separate the irrelevant from the constitutionally impermissible.

The lateness of the hour makes it inappropriate for the Court to entertain the taxpayer's objections. He has waived his objections by failing to timely respond.

Accordingly, it is hereby adjudged, ordered and decreed that the plaintiff taxpayer answer the fifteen interrogatories within twenty days commencing from the date of this order.

ENTER:

JAMES B. PARSONS,
United States District Judge

Dated: April 28, 1972.